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EXAMINER

FISCHER, ANDREW J

ART UNIT	PAPER NUMBER
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3627

DATE MAILED: 10/22/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/556,647

Applicant(s)

BAUER, MITCHELL R.

Examiner

Andrew J. Fischer

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on 23 July 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☐ Claim(s) 1,2 and 31-39 is/are pending in the application.
- 4a) Of the above claim(s) 1-14 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☐ Claim(s) 15-18,21,22 and 31-39 is/are rejected.
- 7) ☐ Claim(s) 19 and 20 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 4.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

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DETAILED ACTION

Acknowledgments

1. The petition titled "Petition Under Rule 144 Restriction Requirement" (Paper No. 16) is acknowledged. The petition has been granted-in-part (See Paper No. 17) affirming the restriction between groups I and II; I and III; I and IV; II and III; and II and IV. The Examiner notes the petition decision withdraws the restriction between groups III and IV.
2. Because Applicant did not receive an office action regarding claims 15-21, the finality of the previous Office Action (Paper No. 15) is hereby withdrawn.
3. The Examiner notes that only the *finality* of the previous Office Action was withdrawn. The Examiner incorporates by reference all other findings of fact and conclusion of law from Paper No. 15 unless expressly noted otherwise in this Office Action. Because Applicant has stated his intent to appeal¹ and in accordance with MPEP §1208 (noting that "an examiner's answer should not refer, either directly or indirectly, to more than one prior office action") the Examiner has reiterated most points made in the previous Office Action(s) in an effort to make this Office Action as complete as possible.

¹ Applicant's Paper No. 16, page 6, ~ lines 18-20.

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Specification

4. The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 C.F.R. 1.75(d)(1), MPEP §608.01(o), and MPEP §2181.

Correction of the following is required:

- a. The “means for storing in a computer system a list of raw materials” as recited in claim 22.
- b. The “means for populating a plurality of filter lists corresponding with said stored customer application criteria” as recited in claim 22.
- c. The “means for displaying a material browser including a plurality of filters” as recited in claim 22.
- d. The “means for selecting one of said filter lists” as recited in claim 22.
- e. The “means for filtering said list of raw materials” as recited in claim 22.

Claim Rejections - 35 USC § 112 2nd Paragraph

5. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the Applicant regards as his invention.

6. Claims 22 and 31-39 are rejected under 35 U.S.C. §112, 2nd paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention.

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a. In claim 22, it is unclear whether Applicant is claiming the subcombination of the apparatus or the combination of the apparatus and the computer system.

If the applicant's intent is to claim only the subcombination, the body of the claim(s) must be amended to remove any positive recitation of the combination. If the applicant intends to claim the combination (*e.g.* the computer system *in addition to* the information itself; or the computer system *in addition to* the computer program; or the computer system *in addition to* the network including the local area network, the Internet, the server, host, and/or ISP, etc. as shown in Figure 1), the Examiner respectfully requests Applicant to clarify this matter by indicating it as so. For purposes of *appeal only*, the Examiner has interpreted the claim as a combination claim including all physical structures shown in Figure 1. If Applicant expressly states on the record that this is a combination claim, this particular 35 U.S.C. §112 2nd rejection will be withdrawn.

- b. In claim 22, the specification does not clearly link the corresponding structure to:
- i. The “means for storing in a computer system a list of raw materials.”
 - ii. The “means for populating a plurality of filter lists corresponding with said stored customer application criteria.”
 - iii. The “means for displaying a material browser including a plurality of filters.”
 - iv. The “means for selecting one of said filter lists.”
 - v. The “means for filtering said list of raw materials.”

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“Failure to describe adequately the necessary structure, material, or acts corresponding to a means-plus-function limitation in the written description means that the drafter has failed to comply with Section 112, Para. 2.” *Atmel Corp. v. Information Storage Devices, Inc.*, 198 F.3d 1374, 1380, 53 USPQ2d 1225, 1229 (Fed. Cir. 1999) citing *In re Dossel*, 115 F.3d 942, 945, 42 USPQ2d 1881, 1884 (Fed. Cir. 1997)).

vi. In claims 16 and 31, the phrase “various customer application criteria” is indefinite. The Examiner respectfully recommends removing “various” from the claim. By including “various” in the claim, it is objective evidence of criteria in the claim other than simply “customer application criteria.”

vii. In claim 18, it is unclear if the “and information specific to permitted applications” is intended to modify “including” in the line above or “storing.”

Claim Rejections - 35 USC § 102

7. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the Applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the Applicant for patent.

8. Claims 22, 31-33, and 39, as understood by the Examiner, are rejected under 35 U.S.C. 102(e) as being anticipated by Salvo et. al. (U.S. 6,341,271 B1)(“Salvo”). Salvo discloses means

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for storing (the hard drive or memory associated with control unit 114); means for populating a plurality of filter lists (the computer the customer's use to input their desired product such as site controller 112); means for displaying a material browser (a computer monitor inherent in any computer); means for selecting one of the computer lists (again an ordinary personal computer having a mouse); means for filtering (the CPU associated with control unit 114); the display means is configured for displaying; mean for sorting a filtered list (again inherent within virtually any personal computer including controller 114).

9. Because Salvo discloses a common computer system, the Examiner finds that the database in Salvo is a relational database.

10. Claims 15-18, 21, 22, 31-33, and 39, as understood by the Examiner, are also rejected under 35 U.S.C. 102(e) as being anticipated by Purcell (U.S. 5,940,807)(Purcell '807"). Purcell '807 discloses storing in a computer system a list of different raw materials (the operating system) with each of the raw materials (inherent in the items offered for sale in the system) having customer application criteria stored within (e.g. description of the product); the criteria being indicative of intended application of the raw material in a product (inherent in the criteria); displaying a material browser (a web browser) including a plurality of filters (buyers' filters); selecting one of the filter lists and specifying criteria (inherent in the buyers' filters); filtering said list of raw materials to obtain a filtered list (inherent in the buyers' filters); displaying in the browser the filtered list; the system is configured for displaying for selecting a plurality of filter lists (each buyer can select at least one list); the web browser is configured for displaying

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customer application criteria (inherent in all browsers); storing raw material information that is different than customer application criteria (price, delivery information, availability); sorting the filtered lists (inherent since the listings would be alphabetical); and filtering by unit by cost.

Claim Rejections - 35 USC § 103

11. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

12. Claims 15-18, 21, 22, 31-33, and 39, as understood by the Examiner, are alternatively rejected under 35 U.S.C. 103(a) as being unpatentable over Salvo.² It is the Examiner's principle position that the claims are anticipated as discussed above because certain elements are inherent.

However if not inherent, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Salvo to include the inherent elements. Such a modification would have provided an express disclosure of what one of ordinary skill in the art would already know.

13. Claims 15-18, and 21 are alternatively rejected under 35 U.S.C. 103(a) as being unpatentable over Salvo and Applicant's admissions regarding the "substantially verbatim"

² See MPEP §2112 expressly authorizing alternative 102/103 rejections when the question of inherency is present in the §102 rejection.

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standard. The Examiner finds that claims 15-21 (Group III) are “substantially verbatim”³ when compared to the corresponding claims in Group IV. The Examiner notes the one-to-one correspondence between the preambles of claims 15 and 22 as requested by Applicant. The Examiner notes the one-to-one correspondence between the six elements of method claim 15 and the six “means for” elements in claim 22 also as requested by Applicant. Because the claims 15-21 are “substantially verbatim” when compared to claims 22, 31-33 and 39, the rejection of claims 15-18 and 21 stands and falls with the rejection of claims 22, 31-33 and 39.

14. Claims 15-18, 21, 22, 31-33, and 39, as understood by the Examiner, are alternatively rejected under 35 U.S.C. 103(a) as being unpatentable over Purcell ‘807 in view of Peterson et. al. (U.S. 6,324,522 B2)(“Peterson”). Again, it is the Examiner’s principle position that the claims are anticipated as discussed above because the criteria being indicative of intended application of the raw material in a product is inherent.

However if not inherent, Peterson teaches using criteria being indicative of intended application of the raw material (e.g. alternate part number, assembly number, or end product); it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Purcell ‘807 as taught by Peterson to include using criteria being indicative of intended application of the raw material. Such a modification would have made searching in Purcell ‘807

³ Because of Applicant’s Remarks in Paper No. 16 regarding “substantially verbatim” standard discussed throughout his petition, the Examiner interprets “substantially verbatim” as being equal to ‘not patentably distinct.’

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easier since if the part number was not known, there would be other ways to identify the desired object.

15. Based upon the definition of seller found in Peterson (column 1), Peterson includes selling raw materials. Moreover, the Examiner finds that raw materials are a form of products.

16. It is also noted that even if (albeit a big if) the Purcell '807/Peterson combination noted above does not disclose the exact claimed stored information (e.g. "information specific to permitted applications), the stored information is nonfunctional descriptive material. In such a case, the missing elements in the Purcell '807/Peterson combination are only found in the nonfunctional descriptive material and are not functionally involved in the claimed product.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to substitute the content of the Purcell '807/Peterson combination with any type of content. The descriptive material will not distinguish the claimed invention over the prior art in terms of patentability because the data does not functionally relate to the claimed invention. See *In re Gulack*, 703 F.2d 1381, 1385, 217 USPQ 401, 404 (Fed. Cir. 1983); *In re Lowry*, 32 F.3d 1579, 32 USPQ2d 1031 (Fed. Cir. 1994). See also MPEP §2106 IV B.

17. Regarding the method claims 15-21, functional recitation(s) using the word "for" (e.g. "for manufacturing a product therefrom" as recited in claim 15) have been considered but given less patentable weight⁴ because they fail to add any steps and are thereby regarded as intended use

⁴ See e.g. *In re Gulack*, 703 F.2d 1381, 217 USPQ 401, 404 (Fed. Cir. 1983)(stating that although all limitations must be considered, not all limitations are entitled to patentable weight.).

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language. A recitation of the intended use of the claimed invention must result in additional steps. See *Bristol-Myers Squibb Co. v. Ben Venue Laboratories, Inc.*, 246 F.3d 1368, 1375-76, 58 USPQ2d 1508, 1513 (Fed. Cir. 2001) (Where the language in a method claim states only a purpose and intended result, the expression does not result in a manipulative difference in the steps of the claim.).

18. Claim 22 begins “An apparatus” Additionally, “[c]laims in apparatus form conventionally fall into the 35 U.S.C. §101 statutory category of a ‘machine.’” *Ex parte Donner*, 53 USPQ2d 1699, 1701 (B.P.A.I. 1999)(unpublished), (Paper No. 34, page 5, issued as U.S. Patent 5,999,907). Products may be either machines, manufactures, or compositions of matter. MPEP §2106 IV B. 2 (a). Therefore, it is the Examiner’s position that Applicant’s apparatus claims (*i.e.* claims 22 and 31-39) are clearly “product” claims or more specifically, “machine” claims. Next, claims directed to apparatus must be distinguished from the prior art in terms of structure rather than function. See *In re Danly*, 263 F.2d 844, 847, 120 USPQ 528, 531 (CCPA 1959). With this in mind, Applicant is reminded that “apparatus claims cover what a device is, not what a device does.” *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990).

19. Regarding Applicant’s machine claims, functional recitation(s) using the word “for” only (*i.e.* not “means for”) (*e.g.* “for displaying in said browser said filtered list of raw materials matching said filter criterion”) have been considered but are given little patentable weight⁵

⁵ See *Gulack*, *supra*.

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because they fail to add any structural limitations and are thereby regarded as intended use language. A recitation of the intended use of the claimed product must result in a structural difference between the claimed product and the prior art in order to patentably distinguish the claimed product from the prior art. If the prior art structure is capable of performing the intended use, then it reads on the claimed limitation. *In re Casey*, 370 F.2d 576, 152 USPQ 235 (CCPA 1967) ("The manner or method in which such machine is to be utilized is not germane to the issue of patentability of the machine itself."); *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). See also MPEP §§ 2114 and 2115. Unless expressly noted otherwise by the Examiner, the claim interpretation principles in this paragraph apply to all examined machine claims currently pending.

By way of example only, the Examiner suggests simply "displaying" instead of "configured for displaying" if a positive recitation is desired.

20. The Examiner concludes that Applicant has decided not to be his own lexicographer by indicating and defining claim limitations to have meanings other than their ordinary and accustomed meanings. To support this position, the Examiner relies on the following factual findings. First and as noted in the previous Office Actions,⁶ the Examiner has carefully reviewed the specification and prosecution history and can not locate any lexicographic definition(s). Second, the Examiner finds that not only has Applicant not pointed to any definitional statements in his specification or prosecution history, Applicant has also not pointed to a term or terms in a claim with which to

⁶ See e.g. the Examiner's previous Office Action mailed August 2, 2002, Paper No. 5, Paragraph No. 10.

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draw in those statements.⁷ Third, after receiving express notice in the previous Office Action⁸ of the Examiner's position that lexicography is *not* invoked, Applicant has not pointed out the "supposed errors" in the Examiner's position regarding lexicography invocation in accordance with 37 C.F.R. §1.111(b) (i.e. Applicant has not argued lexicography *is* invoked). Finally and to be sure of Applicant's intent, the Examiner also notes that Applicant has declined the Examiner's express invitation⁹ to be his own lexicographer.¹⁰ Accordingly and for due process purposes, the Examiner gives notice that for the remainder of the examination process (and except as interpreted under 35 U.S.C. 112 6th paragraph noted below), the heavy presumption in favor of the ordinary and accustomed meaning is not overcome; the claims therefore continue to be interpreted with their "broadest reasonable interpretation" *In re Morris*, 127 F.3d 1048,

⁷ "In order to overcome this heavy presumption in favor of the ordinary meaning of claim language, it is clear that a party wishing to use statements in the written description to confine or otherwise affect a patent's scope must, at the very least, point to a term or terms in the claim with which to draw in those statements." *Johnson Worldwide Assocs. v. Zebco Corp.*, 175 F.3d 985, 989, 50 USPQ2d 1607, 1610 (Fed. Cir. 1999).

⁸ See again the previous Office Action, Paper No. 5, Paragraph No. 10.

⁹ *Id.*

¹⁰ The Examiner's requirements on this matter were reasonable on at least two separate and independent grounds. First, the Examiner's requirements were simply an express request for clarification of how Applicant intend his claims to be interpreted so that lexicography (or even an *attempt* at lexicography) by Applicant was not inadvertently overlooked by the Examiner. Second, the requirements were reasonable in view of the USPTO's goals of compact prosecution, productivity with particular emphasis on reductions in both pendency and cycle time, and other goals as outlined in the USPTO's The 21st Century Strategic Plan, February 3, 2003 available at www.uspto.gov/web/offices/com/strat21/index.htm (last accessed October 7, 2003).

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1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997).¹¹ The Examiner now relies heavily and extensively on this interpretation.¹² Unless expressly noted otherwise by the Examiner, the preceding claim interpretation principles in this paragraph apply to all examined claims currently pending.

21. Under the broadest reasonable interpretation standard noted above and unless modified in this Office Action, the Examiner maintains his interpretations. These definitions¹³ are part of the administrative record and, in accordance with *In re Morris*, are provided simply as a factual source to support the Examiner's claim interpretations (and ultimately the Board of Patent Appeals and Interferences¹⁴ claim interpretations) during ex parte examination. Therefore, to the extent that the Examiner's interpretations are different from Applicant's interpretations, the Examiner hereby adopts the following definitions—under the broadest reasonable interpretation

¹¹ See also *In re Bass*, 314 F.3d 575, 577, 65 USPQ2d 1156, 1158 (Fed. Cir. 2002) (“In examining a patent claim, the PTO must apply the broadest reasonable meaning to the claim language, taking into account any definitions presented in the specification. Words in a claim are to be given their ordinary and accustomed meaning unless the inventor chose to be his own lexicographer in the specification.”); MPEP §§ 2111 and 2111.01; and *In re Etter*, 756 F.2d 852, 858, 225 USPQ 1, 5 (Fed. Cir. 1985) (en banc).

¹² See 37 C.F.R. §1.104(c)(3) which states in part: “the examiner may rely upon admissions by applicant . . . as to *any matter* affecting patentability [Emphasis added.]”

¹³ While most definitions are cited because these terms are found in the claims, the Examiner may have provided additional definition(s) to help interpret words, phrases, or concepts found in the definitions themselves or words, phrases, or concepts found in the prior art.

¹⁴ See *Gechter v. Davidson*, 116 F.3d 1454, 1460, 43 USPQ2d 1030, 1035 (Fed. Cir. 1997) (“[W]e hold that the Board is required to set forth in its opinions specific findings of fact and conclusions of law adequate to form a basis for our review.”).

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standard—in all his claim interpretations. Finally, the Examiner notes that the following list is not exhaustive in any way.

- a. **Server:** “2. On the Internet or other network, a computer or program that responds to commands from a client.” Computer Dictionary, 3rd Edition, Microsoft Press, Redmond, WA, 1997.¹⁵ **Client:** “3. On a local area network or Internet, a computer that accesses shared network resources provided by another computer (called a *server*).” *Id.* **Computer:** “Any machine that does three things: accepts structured input, processes it according to prescribed rules, and produces the results as output.” *Id.*
- b. **Database** “A file composed of records, each containing fields together with a set of operations for searching, sorting, recombining and other functions.” *Id.*
- c. **Network** “A group of computers and associated network devices that are connected by communications facilities.” *Id.*
- d. **Relational Database** “A database or database management system that stores information in tables—rows and columns of data—and conducts searches by using data in specified columns of one table to find additional data in another table. In a relational database, the

¹⁵ Based upon Applicant’s claims, specification, and drawings, the art now of record, and the knowledge of one of ordinary skill in this art as discussed in MPEP §2141.03, the Examiner’s finds that the *Microsoft Press Computer Dictionary* is an appropriate technical dictionary known to be used by one of ordinary skill in this art. See e.g. *Altiris Inc. v. Symantec Corp.*, 318 F.3d 1363, 1373, 65 USPQ2d 1865, 1872 (Fed. Cir. 2003) where the Federal Circuit used *Microsoft Press Computer Dictionary* (3d ed.) as “a technical dictionary” used to define the term “flag.” See also *In re Barr*, 444 F.2d 588, 170 USPQ 330 (CCPA 1971)(noting that its appropriate to use technical dictionaries in order to ascertain the meaning of a term of art) and MPEP §2173.05(a) titled “New Terminology”.

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rows of a table represent records (collections of information about separate items) and the columns represent fields (particular attributes of a record). In conducting searches, a relational database matches information from a field in one table with information in a corresponding field of another table to produce a third table that combines requested data from both tables. . . .

Microcomputer database products typically are relational database. *Compare* flat-file database, inverted-list database.” *Id.*

e. **Relational Model** “A data model in which the data is organized in relations (tables). This is the model implemented in most modern database management systems.” *Id.*

f. **Raw Material** “any product used as a component in the manufacturing process of finished goods.” Dictionary of Business Terms, 3rd Edition, Barron’s Educational Series, Inc., 2000. **Finished Goods** “products or goods that have been completely assembled or built; also called finished products. *Id.*

g. **Material** “1 a : the elements constituents, or substance of which something is composed or can be made” Merriam-Webster’s Collegiate Dictionary, 10th Edition, Merriam-Webster Inc., Springfield, M.A., 1997.

h. **Configure** “: to set up for operation esp. in a particular way . . .” *Id.*

i. **Corresponding** “1 . . . b : RELATED, ACCOMPANYING” *Id.*

j. **Criterion** “1 : a standard on which a judgment or decision may be based.” *Id.*

k. **Information** “ 2 a . . . (3): FACTS, DATA . . .” *Id.*

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1. ***Browser*** “See Web browser” *Id.* ***Web Browser*** “ A client application that enable a user to view HTML documents on the World Wide Web, another network, or the user’s computer; follow the hyperlinks among them; and transfer files. Text based Web browsers, such as Lynx, can sever users with shell accounts but show only the text elements of an HTML document; most Web browsers, however, require a connection that can handle IP packets but will also display graphics that are in the document, play audio and video files, and execute small programs, such as Java applets or ActiveX controls, that can be embedded in HTML documents. Some Web browsers require helper applications or plug-ins to accomplish one or more of these tasks. In addition, most current Web browsers permit users to send and receive e-mail and to read and respond to newsgroups. Also called *browser*. *Id.*

35 U.S.C. 112 6th Paragraph

22. First, after further review of the specification and claims, the Examiner finds (and it therefore now will be presumed) that the potential means-plus-function limitations in claim 22 are *not* the *only* point of novelty. The Examiner therefore begins his §112 6th paragraph analysis with this presumption.

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The claim is construed as a combination claim¹⁶ and there is no *single* patentable element of such a combination claim.¹⁷ If Applicant disagrees with this presumption, the Examiner respectfully requests Applicant to properly traverse the Examiner's presumption in their next properly filed response and provide appropriate arguments in support thereof. Failure by Applicant to address this issue in accordance with 37 C.F.R. §1.111(b) or to be non-responsive to this issue entirely will be considered a desire by Applicant to maintain the presumption that the means-plus-function limitations are not the claims' *only* point of novelty. The Examiner will henceforth rely on this presumption.

Means Phrase #1***Invocation***

23. It is the Examiner's position that in claim 6, the phrase "means for storing in a computer system a list of raw materials" ("Means Phrase #1") is an attempt by Applicants to invoke 35 U.S.C. 112 6th paragraph. If Applicants disagree, the Examiner respectfully requests Applicants to either amend the claim to remove all instances of "means for" from the claim, or to explicitly state on the record (and supply arguments in support thereof) why 35 U.S.C. 112 6th paragraph should not be invoked.

¹⁶ See also Paragraph No. 6a above.

¹⁷ See e.g. *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 345, 128 USPQ 354, 359 (1961) (stating that "there is no legally recognizable or protected 'essential' element, 'gist' or 'heart' of the invention in a combination patent.")

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Invocation Step 1:

a. First, in accordance with the MPEP §2181, the *Supplemental Examination Guidelines for Determining the Applicability of 35 USC 112 6th* (“Guidelines”)¹⁸, and *Al-Site Corp. v. VSI International Inc.*, 174 F.3d 1308, 1318, 50 USPQ2d 1161, 1166 (Fed. Cir. 1999),¹⁹ Applicant’s use of “means for” in claim 1 creates a rebuttable presumption that tends to invoke 35 U.S.C. 112 6th paragraph. If the word “means” appears in a claim element in combination with a function, it is presumed to be a means-plus-function element in which §112 6th paragraph applies. *Id.* Since “means for” is recited in Means Phrase #1, this step is clearly met.

Invocation - Step 2:

b. Second, in accordance with MPEP §2181, the Guidelines, and *Budde v. Harley-Davidson, Inc.*, 250 F.3d 1369, 1376, 58 USPQ2d 1801, 1806 (Fed. Cir. 2001), it is the Examiner’s position that Applicants recite a corresponding function to the means—“for storing in a computer system a list of raw materials.”

The Examiner notes that when determining the function recited “[u]nless something in the written description suggests that the patentee intended the unambiguous language to be construed

¹⁸ Federal Register Vol 65, No 120, June 21, 2000.

¹⁹ See also *Sage Prods., Inc. v. Devon Industry, Inc.*, 126 F.3d 1420, 1427, 44 USPQ2d 1103, 1109 (Fed. Cir. 1997); *Greenberg v. Ethicon Endo-Surgery, Inc.*, 91 F.3d 1580, 1583, 39 USPQ2d 1783, 1785 (Fed. Cir. 1996).

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in a manner inconsistent with its ordinary meaning, we are bound by that language.” *Telemac Cellular Corp. v. Topp Telecom Inc.*, 58 USPQ2d 1545, 1550 (Fed. Cir. 2001). Here, the function as found in the Means Phrase #1 will have its ordinary meaning.

Invocation - Step 3:

c. Third, in accordance with MPEP §2181, the Guidelines, and *Personalized Media Communications, LLC v. International Trade Commission*, 161 F.3d 696, 704, 48 USPQ2d 1880, 1887 (Fed. Cir. 1998), the means-plus-function clause must not recite sufficient definite structure for performing that function.

In our case, Means Phrase #1 does not recite the structural elements which perform the function. In determining whether the presumption of invocation is rebutted, “the focus remains on whether the claim ... recites sufficiently definite structure.” *Id.* Furthermore, sufficient structure does not require an exhaustive recitation—only structure to perform entirely the claimed function. *Rodime PLC v. Seagate Technology Inc.*, 174 F.3d 1294, 1304, 50 USPQ2d 1429, 1436 (Fed. Cir. 1999). Clearly the “storing in a computer system a list of raw materials” can not be entirely performed by the little if any recited structure in the claim.

Because of the above, it is the Examiner’s position that Means Phrase #1 invokes 35 U.S.C. 112 6th paragraph.

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Corresponding Structure, Material, or Acts

24. In accordance with MPEP §2181, the Guidelines (section “II”) and *Medtronic*, 248 F.3d at 1311, 58 USPQ2d at 1614, “The next step is to determine the corresponding structure described in the specification and equivalents thereof. Structure disclosed in the specification is ‘corresponding’ structure only if the specification or prosecution history clearly links or associates that structure to the function recited in the claim.” *Id.*

a. In our case and as noted above in the section title ‘35 U.S.C. 112 2nd Paragraph,’ the corresponding structure is not clearly linked in the written description with the required specificity. Therefore, a 35 U.S.C. 112 2nd paragraph rejection results. “If the language of the claim is such that a person of ordinary skill in the art could not interpret the metes and bounds of the claim so as to understand how to avoid infringement, a rejection of the claim under 35 U.S.C. 112, second paragraph would be appropriate.” MPEP §2173.02 citing *Morton Int’l, Inc. v. Cardinal Chem. Co.*, 5 F.3d 1464, 1470, 28 USPQ2d 1190, 1195 (Fed. Cir. 1993). For example, the corresponding structure could be a CPU, hard drive, computer memory, the BIOS, other software, all of the above, or some other structure. Because of this ambiguity, it is the Examiner’s factual determination that a person of ordinary skill in the art could not interpret the metes and bounds of the claim so as to understand how to avoid infringement.

25. The Examiner will next apply the above reasoning to all claimed phrases that potentially invoke 35 U.S.C. 112 6th paragraph. Citations and authorities will be omitted for clarity.

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26. It is the Examiner's position that Means Phrase #1 and all subsequent means phrases have considered including the entire specification, including claims and drawings.

Means Phrase #2

27. It is the Examiner's position that the "means for populating a plurality of filter lists corresponding with said stored customer application criteria" ("Means for Phrase #2") invokes 35 U.S.C. 112 6th paragraph.

- a. Means for Phrase #2 meets Invocation Step 1 because "means for" is recited.
- b. Means for Phrase #2 meets Invocation Step 2 because the phrase recites the function of "for populating a plurality of filter lists corresponding with said stored customer application criteria." This function will have its ordinary and plain meaning.
- c. Means for Phrase #2 meets Invocation Step 3 because the claim does not recite sufficient definite structure for performing the function of "for populating a plurality of filter lists corresponding with said stored customer application criteria"
- d. The specification fails to directly disclose what structural elements make up Means Phrase #2. In other words, the corresponding structure is not clearly linked in the written description with the required specificity. For prior art purposes only, the Examiner will presume that the corresponding structure is the CPU, software, and memory.

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Means Phrase #3

28. It is the Examiner's position that the "means for displaying a material browser including a plurality of filters" ("Means for Phrase #3") invokes 35 U.S.C. 112 6th paragraph.

a. Means for Phrase #3 meets Invocation Step 1 because "means for" is recited.

b. Means for Phrase #3 meets Invocation Step 2 because the phrase recites the function of "for populating a plurality of filter lists corresponding with said stored customer application criteria." This function will have its ordinary and plain meaning.

c. Means for Phrase #3 meets Invocation Step 3 because the claim does not recite sufficient definite structure for performing the function of "for populating a plurality of filter lists corresponding with said stored customer application criteria"

d. Again, the corresponding structure is not clearly linked in the written description with the required specificity. The specification fails to directly disclose what structural elements make up Means Phrase #3. For prior art purposes only, the Examiner finds that the an ordinary computer monitor is the corresponding structure.

Means Phrase #4

29. It is the Examiner's position that the "means for selecting one of said filter lists" ("Means for Phrase #4") invokes 35 U.S.C. 112 6th paragraph.

a. Means for Phrase #4 meets Invocation Step 1 because "means for" is recited.

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b. Means for Phrase #4 meets Invocation Step 2 because the phrase recites the function of “for selecting one of said filter lists.” This function will have its ordinary and plain meaning.

c. Means for Phrase #4 meets Invocation Step 3 because the claim does not recite sufficient definite structure for performing the function of “for selecting one of said filter lists. . .”

d. Again, the corresponding structure is not clearly linked in the written description with the required specificity. The specification fails to directly disclose what structural elements make up Means Phrase #4. For prior art purposes only, the Examiner finds that the an the computer operating system and mouse are the corresponding structure.

Means Phrase #5

30. It is the Examiner’s position that the “means for filtering said list of raw materials” (“Means for Phrase #5”) invokes 35 U.S.C. 112 6th paragraph.

a. Means for Phrase #5 meets Invocation Step 1 because “means for” is recited.

b. Means for Phrase #5 meets Invocation Step 2 because the phrase recites the function of “for filtering said list of raw materials.” This function will have its ordinary and plain meaning.

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c. Means for Phrase #5 meets Invocation Step 3 because the claim does not recite sufficient definite structure for performing the function of “for selecting one of said filter lists. . .”

d. Again, the corresponding structure is not clearly linked in the written description with the required specificity. The specification fails to directly disclose what structural elements make up Means Phrase #5. For prior art purposes only, the Examiner finds that the CPU and software are the corresponding structure.

Allowable Subject Matter

31. Claims 19 and 20 objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

32. Claims 34-38 would be allowable if rewritten to overcome the rejection(s) under 35 U.S.C. 112, second paragraph, set forth in this Office action and to include all of the limitations of the base claim and any intervening claims.

Response to Arguments

33. Applicant's arguments with respect to the claims have been considered but are moot in view of the new ground of rejection.

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34. The Examiner acknowledges Applicant's arguments regarding patentability in his petition (Paper No. 16). Because *patentability* has no bearing on a petition to withdraw a restriction, Applicant's patentability arguments were properly handled by the USPTO in the decision on petition (see Paper No. 17). However because Applicant continues to muddy the evidentiary record, the Examiner notes the following:

35. Applicant argues "The Examiner *always has* the burden of proof in the examination process; and Applicant need only point out the errors therewith. [Emphasis added]"²⁰ The examiner disagrees. While the Examiner has the *initial* burden to of proof, Applicant's statement shows how Applicant is unfamiliar with the basic concept of a 'prima facie case.' See e.g. *In re Schreiber*, 128 F.3d 1473, 1478, 44 USPQ2d 1429, 1432 (Fed. Cir. 1997) (noting that once the examiner makes out a prima facie case of anticipation, *the burden shifts to the Applicant* to show that the prior art structure does not inherently possess the functionally defined limitations of his claimed apparatus.). See also *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992)("The prima facie case is a procedural tool of patent examination, allocating the burdens of going forward as between examiner and Applicant").

36. On page 8, Applicant discusses his "substantially verbatim" standard and quotes the Examiner: "The examiner merely claimed 'unawareness' of such standard without regard to the express claim language of these claims" The Examiner has carefully reviewed the Final Office Action mailed June 6, 2003 (Paper No. 15) and the Office Action mailed March 27, 2003

²⁰ Applicant's Paper No. 16, page 6, ~ lines 5-7.

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(Paper No. 12) and he can not locate the word “unawareness.” So that Applicant does not mislead a reviewing body of what the Examiner has and has not said, the Examiner respectfully requests that if Applicant intends to quote *any* portion of any Office Action, the quoted phrase must at least be actually *found in the Office Action* and not fictional.

37. Applicants have also proffered completely opposite arguments that also confuse the record. For example and as noted above, the Examiner initially afforded “means for” phrases broad interpretations. But in Applicant’s interview with Examiner Cuff (see Interview Summary, Paper No. 14) and page 2 of Applicant’s petition (Paper No. 16)) Applicant *demand*ed that “means for” phrases be analyzed in accordance with 35 U.S.C. 112 6th paragraph. Because of Applicant’s demand, a *separate* final Office Action was made (Paper No. 15). However in Applicant’s petition, Applicant now argues for the opposite; Applicant argues “it is notoriously broad practice for the USPTO to afford ‘means for’ elements extraordinarily broad interpretation It is not seen how the common examination practice of broadly constructing means elements can be ignored for apply unreasonably narrow interpretation of the claim 1 method solely for restriction practice”²¹ These two position are *completely opposite* and add confusion to the record. While the Examiner will not speculate as to why this Applicant has made totally opposite arguments, in the past, other applicants have made such completely opposite arguments so that which ever position they take in the future, they will always have support for their position.

²¹ Paper No. 16, Page 10, ~ paragraphs 5-8.

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38. Applicant also states, “the examiner’s previous listing of field search in PTO-892 is contra to the examiner’s contention of search fields.”²² This statement, like most of Applicant’s statements, are not persuasive because at least in this case, PTO-892 *does not have* a field of search. This statement is evidence of Applicant’s unfamiliarity of form titled PTO-892.

39. Applicant also hopes “in the decision of this Petition the door may be opened to negotiate a settlement of this application.”²³ The Examiner has never read or even *heard of* negotiating a “settlement to an application.” The Examiner therefore requests Applicant to point out where in the MPEP the Examiner is authorized “to negotiate a settlement of this application.” Once authorized, the Examiner will negotiate a settlement of this application in accordance with appropriate rules and MPEP sections. However until that section of the MPEP is brought to the attention of the Examiner, the allowed claims will be allowed and the rejected claims will be rejected.

40. With respect to the 35 U.S.C. §112 2nd rejection regarding the combination/subcombination, the Examiner finds that it is impossible to properly construe claim scope at this time. See *Honeywell International Inc. v. ITC*, 68 USPQ2d 1023, 1030 (Fed. Cir. 2003) (“Because the claims are indefinite, the claims, by definition, cannot be construed.”). However, in accordance with MPEP §2173.06 and the USPTO’s policy of trying to advance prosecution by providing art rejections even though the claims contain 35 U.S.C. 112 2nd

²² Paper No. 16, Page 14, ~ paragraph 3.

²³ Paper No. 16, Page 15, ~ last paragraph

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paragraph rejections, the claims are construed and the art is applied *as much as practically possible*. For purposes of the combination/subcombination 35 U.S.C. §112 2nd rejection, the Examiner has construed the claims as *combination* claims in order to apply the prior art. Upon appropriate resolution of the 35 U.S.C. 112 rejections, the claims will be reinterpreted to access claim scope and if not allowable, have the best prior art applied to the claims.

41. Finally, with respect to Applicant's argument regarding Purcell in Paper No. 8, they too are not persuasive. Applicant's arguments add to the confusion. For example, the Examiner initially laid out an obviousness rejection with Purcell (as the primary reference) in view of Herridge. In his response, Applicant appears to challenge the *format* for an obviousness rejection when he emphatically states "yet Purcell does not disclose an infinite variety of things, or the infinite variety of elements found in the six million plus issued patents in the USPTO database."²⁴

Unfortunately, the Examiner is *required* to state in obviousness rejections what the reference *does* and *does not* show. *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459, (1966).²⁵ While Applicant's challenge of the format required by *Graham* as set out by the Supreme Court *over 30 years ago* is noted for the record, the Examiner nevertheless declines to reverse the Supreme Court at this time. Such arguments are therefore not persuasive.

²⁴ Applicant's Remarks filed October 22, 2003, Part of Amendment 'A', Paper No. 8, Page 19, ~ lines 3-7.

²⁵ See also MPEP §2143 for a basic discussion of how examiners make obviousness rejections.

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Conclusion

42. Applicant's amendment necessitated the new grounds of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP §706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 C.F.R. §1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 C.F.R. §1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

43. The prior art made of record considered pertinent to Applicant(s)' disclosure includes the following: Mundell et. al. (U.S. 6,549,890 B2); Wallace (U.S. 6,366,829 B1); and Brown et. al. (U.S. 4,972,318).

44. Unless expressly noted otherwise within this Office Action, the following two citations to the Manual of Patent Examining Procedure ("MPEP") apply: MPEP citations to Chapters 200, 700, 1800, and 2100 are from the MPEP 8th Edition, Rev 1, February 2003. All remaining MPEP citations within this Office Action are from the MPEP 8th Edition, August 2001.

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45. In accordance with *In re Lee*, 277 F.3d 1338, 1344, 61 USPQ2d 1430, 1434-35 (Fed. Cir. 2002), the Examiner finds that the references How Computers Work Millennium Ed. by Ron White; How Networks Work, Millennium Ed. by Frank J. Derfler et. al.; and How the Internet Works, Millennium Ed. by Preston Gralla are additional evidence of what is basic knowledge or common sense to one of ordinary skill in this art. Each reference is cited in its entirety. Moreover, because these three references are directed towards beginners (see e.g. “User Level Beginning . . .”), because of the references’ basic content (which is self-evident upon review of the references), and after further review of both the intrinsic evidence of record and the entire art now of record in conjunction with the factors as discussed in MPEP §2141.03, the Examiner finds that these three references are primarily directed towards those of low skill in this art. Because these three references are directed towards those of low skill in this art, the Examiner finds that one of ordinary skill in this art must—at the very least—be aware of the knowledge and information contained within these three references.

46. The Examiner again notes that at least two courtesy calls were made on or about February 12, 2002 and March 5, 2002 to Applicant in an effort to allow the application. It is the Examiner’s position that every effort was made to position the case for allowance before the application became Final. Specifically, the Examiner stated claims 34 and 35 (in addition to any claims dependent upon these claims) were allowable and invited Applicant to file a supplemental amendment to get the application in condition for allowance. As of the date below, Applicant has declined to exercise this option.

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47. Because this application yet again now final and because of the Examiner's attempt to place this application in condition for allowance as noted in the paragraph directly above, Applicant is reminded of the USPTO's after final practice as discussed in MPEP §714.12 and §714.13 and that entry of amendments after final is *not* a matter of right. "The refusal of an examiner to enter an amendment after final rejection of claims is a matter of discretion." *In re Berger*, 279 F.3d 975, 984, 61 USPQ2d 1523, 1529 (Fed. Cir. 2002) (citations omitted). Furthermore, suggestions or examples of claim language provided by the Examiner are just that—suggestions or examples—and do not constitute a formal requirement mandated by the Examiner. Unless stated otherwise by an express indication that the claim is "allowed," exemplary claim language provided by the Examiner to overcome a particular rejection or to change claim interpretation has *not been addressed* with respect to other aspects of patentability (e.g. §101 patentable subject matter, §112 1st paragraph written description and enablement, §112 2nd paragraph antecedent basis and indefiniteness, and §102 and §103 prior art). Therefore, any claim amendment submitted under 37 C.F.R. §1.116 that incorporates an Examiner suggestion or example or simply changes claim interpretation will nevertheless require further consideration and/or search and a patentability determination as described above.

48. All factual findings and conclusions of law in this Office Action are based the entire record. Although the Examiner may have singled out various items of evidence (*e.g.* Salvo) and expressly noted its content, the other documents now of record were also considered and applied when making the Examiner's factual findings and conclusions of law (see *e.g.* the prior art

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rejection(s) above). Moreover, because many of the cannons of claim construction are generally viewed from a person of ordinary skill in the art,²⁶ the other documents of record not specifically mentioned in the prior art rejection(s) above were nevertheless used in the Examiner's deliberative process to assess, inter alia, the definiteness of the claims, the level of skill in the art, and ultimately the patentability of the claimed invention.

49. For purposes of appeal and for Applicant's benefit, the Examiner strongly recommends that when Applicant is trying to make a point, he start with a heading and a sentence or two which summarizes his point. After that heading and summary, he can then provide additional analysis of his point. Applicant's previous remarks (e.g. see Remarks in Paper No. 8, page 17-28) at times jumps all over the place and tends to ramble on. Whatever point Applicant is trying to make in these pages is lost. Moreover, if Applicant believes a reference does not have a particular claimed feature, Applicant should quote *the exact claim language* that he is arguing is not found in the reference. This is the easiest way to narrow differences.

50. In accordance with the USPTO's goals of customer service, compact prosecution, and reduction of cycle time, the Examiner has made every effort to clarify his position regarding claim interpretation and any rejections or objections in this application. Furthermore, the Examiner has again provided Applicant(s) with notice—for due process purposes—of his position regarding his factual determinations and legal conclusions. The Examiner notes and thanks Applicant for his

²⁶ See e.g. *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1576, 1 USPQ2d 1081, 1088 (Fed. Cir. 1986)(noting that the definiteness inquiry focuses on whether those skilled in the art would understand the scope of the claim).

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"Remarks" (Paper Nos. 11 and 16) traversing the Examiner's positions on various points. If Applicant disagrees with any *additional* factual determination or legal conclusion made by the Examiner in this Office Action whether expressly stated or implied²⁷, the Examiner respectfully reminds Applicant to properly traverse the Examiner's position(s) in accordance with 37 C.F.R. §1.111(b) *in his next properly filed response*. By addressing these issues now, matters where the Examiner and Applicant agree can be eliminated allowing the Examiner and Applicant to focus on areas of disagreement (if any) with the goal towards allowance in the shortest possible time. If Applicant has *any* questions regarding the Examiner's positions or has other questions regarding this communication or even previous communications, Applicant is strongly encouraged to contact Examiner Andrew J. Fischer whose telephone number is (703) 305-0292. If attempts to reach the Examiner by telephone are unsuccessful, the examiner's immediate supervisor, Robert Olszewski, can be reached at (703) 308-5183. The fax number for facsimile responses is now (703) 872-9306.



Andrew J. Fischer
Patent Examiner

AJF
October 7, 2003

²⁷ E.g., if the Examiner rejected a claim under §103 with two references, although not directly stated, it is the Examiner's implied position that the references are analogous art.